BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 148 Fed. (2d), 561, (Advance Sheets), and is set forth in the printed record (R. 439) which is filed concurrently with the petition for writ of certiorari.

The decision of the Federal Trade Commission in said cause is reported in 36 Federal Trade Commission Decisions, 685 and is set forth on pages 18 to 30, inclusive, of the record.

JURISDICTION

1. The decree of the United States Circuit Court of Appeals for the Ninth Circuit modifying, affirming and enforcing the order of the Federal Trade Commission to cease and desist was filed and entered on the 4th day of April, 1945. Thereafter, on the 21st day of April, 1945, a petition for rehearing was duly filed and presented to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 7th day of May, 1945, the said petition for rehearing was denied. (R. 445)

2. The statutory provisions which sustain the jurisdiction of this court are set forth in the petition for writ of certiorari aforesaid under the heading of

"Statement as to Jurisdiction" and reference thereto is hereby incorporated herein.

3. The jurisdiction of this court is sustained by its decision in the case of *International Shoe Co. vs. Federal Trade Commission*, 279 U. S. 832, 849; 280 U. S. 291; 49 Supreme Court, 478.

STATEMENT OF THE CASE

The statement of the case is set forth in the preceding petition under the heading "Statement of the Case" and the same is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the use of the trade name "Hollywood," designating petitioners' cosmetic preparation, was misleading and deceptive.

2. The said court erred in affirming the decision of the Federal Trade Commission directing the issuance of an order to cease and desist from the use of the trade name "Hollywood" for the reason that there was no substantial evidence in the record to sustain the findings of the Commission that such trade name was unfair or deceptive.

SUMMARY OF ARGUMENT

A. The greater proportion of the merchandise sold under the Hollywood label was actually manufactured

in Hollywood, California, and this fact justifies the use of said word upon petitioners' products.

B. The fundamental premise upon which the Commission's case is based is that the use of the word "Hollywood," in connection with cosmetics, creates the impression among the public that such cosmetics are used or favored by people engaged in the motion picture industry which is located in Hollywood, California. There is absolutely no evidence in the record to sustain the finding that the petitioners' products, sold under the Hollywood label, are not used or favored by people engaged in the motion picture industry or that such impression, if it exists, is a false impression.

ARGUMENT

A

The uncontradicted evidence is that the merchandise sold by the petitioners under the name "Howe's Hollywood Cosmetics" was manufactured in a number of places including Hollywood, California, Seattle, Washington, Newark, New Jersey, and New York, N. Y. (R. 145, 146, 147)

The evidence is also uncontradicted that in the operation of a cosmetic manufacturing business it is not feasible or practicable to manufacture the complete line within any single plant. Practically all manufacturers of cosmetic products manufacture a portion of their line in their own plant; other portions of the line

are manufactured elsewhere, particularly where it is uneconomical to produce particular items in the manufacturer's own plant. (R. 225). Certain cosmetic products, such as nail polish, lipstick, and rouge require machinery of an expensive type, which is difficult to operate, with the result that certain manufacturers specialize in the production of such items. Most manufacturers of cosmetic preparations procure these specialized items from two or three sources in the United States, which are located in New York, New York; Milwaukee, Wisconsin, and Newark, New Jersey. (R. 225).

The evidence further affirmatively shows that the practice followed by the petitioners was the same as that ordinarily followed by other manufacturers of cosmetics throughout the country in that particular products such as those mentioned were procured from manufacturers who specialized in the production of such items. (R. 145, 146, 147)

Therefore, it appears that the cosmetic line, which was produced and distributed by the petitioners, was procured from several sources throughout the country and that the practice followed by the petitioners was that commonly used by cosmetic manufacturers and was one which was adapted to the economic operation of the petitioners' business.

Although the Howe's Hollywood cosmetic line was actually manufactured in a number of places through-

out the country, the preponderance of the entire line was manufactured in Hollywood, California. The uncontradicted evidence is that 52.9% of the total Hollywood line was produced in Hollywood, California. (R. 418, 419).

It is submitted that in the light of these facts, concerning which there is no dispute, any manufacturer of cosmetic products, whose products originate preponderantly in one locality, has the right to use the name of that locality in connection with his general trade name and that neither the manufacturers nor the community whose payroll is augmented by the presence of the company, should be penalized because the economic necessities of its business require a portion of its products to be made elsewhere. The established practice in the cosmetic business, as shown by the evidence, was for manufacturers and distributors to procure their products from different sections of the country. Any rule which would prevent a manufacturer, the preponderance of whose products are produced in a particular locality, from using the name of that locality to designate his products, would lead to complete confusion. We submit, therefore, that the right of the petitioners to use the word "Hollywood" is completely justified by the fact that the preponderance of the merchandise sold under that label was actually manufactured in Hollywood, California.

B

There is no evidence whatever to sustain the Commission's finding that the public impression of the use of the word "Hollywood" by the petitioners was a false impression.

The petitioners will concede that the word "Hollywood" and the motion picture industry are, in public common parlance, synonymous terms. As testified to by the Commission's witness, Smith, the word "Hollywood" is symbolic of the motion picture industry. (R. 306). That the purchasing public does not attach any geographical significance to the word "Hollywood" is borne out by the undisputed fact that of all of the cosmetics made and sold in the United States, only three per cent are actually made in Hollywood. (R. 24, 378). Of this three per cent, the two principal lines of cosmetics, namely Max Factor and Colonial Dames (R. 259, 260, 272) do not use the word "Hollywood" in their trade names, nor does the "House of Hollywood, Inc." another principal manufacturer in Hollywood, which uses the trade name "La Bonita." (R. 404, 405). Furthermore, there is no evidence whatever in the record to the effect that the cosmetics and beauty aids, which are used professionally by motion picture actresses in their facial makeup and studio work, are manufactured in Hollywood or that the public believes that they are manufactured in Hollywood. Furthermore, there is no evidence whatever in the record that

there is any general public understanding of the geographical location of Hollywood or that geographically it has any significance whatever. This is very eloquently borne out by the fact that the Federal Trade Commission itself was uncertain as to the locality of Hollywood as indicated by the fact that the Commission found it necessary while a review of its order was pending in the Circuit Court of Appeals to move to amend its order in this proceeding defining "Hollywood" to include the cities of Los Angeles, Santa Monica, Glendale, Culver City and Beverly Hills. (R. 436, 443). There is no evidence in the record, nor can there be any rational basis for the conclusion, that the public believes that Los Angeles County and Hollywood are synonymous.

These facts are mentioned to demonstrate the inevitable conclusion that the term "Hollywood," as such, has no geographical significance to the purchasing public.

Therefore, if the evidence upon which the Commission's findings are based were reduced to a single proposition, this proposition would be stated as follows: That the use of the word "Hollywood" in connection with cosmetics gives the impression that such cosmetics are used or favored by people engaged in the motion picture industry, which is located in Hollywood, California.

If this is the impression created by the use of the word "Hollywood," the petitioners emphatically submit that there is absolutely no evidence in the record that the impression is, in anywise, untrue; the petitioners further emphatically submit that there is absolutely no evidence in the record that the petitioners' products, sold under the designation of "Howe's Hollywood," are not used or favored by people engaged in the motion picture industry, but, on the contrary, the only evidence in the record is that the petitioners' products sold under such trade designation are, in fact, used and favored by people living in Hollywood and engaged in the motion picture industry.

We wish to direct the court's attention to all of the evidence of record on this subject the following excerpt of which is complete:

(Testimony of Phil Howe. R. 152-155)

"Q. Has Howe's Hollywood Cosmetics been a favorite of the stars and movie actresses?

A. Oh, it is hard to answer that. I would say that a reasonable volume of business is done with the people in the movie colony, as much so as a lot of other lines operating in the same area.

Q. Has it been approved by the movie actresses located in Hollywood, California?

Mr. Starin: I object to that as being immaterial. I don't think that there is any representation that we allege in our answer that it has been approved.

Mr. Kash: Well, the words "favorite of the stars" would imply that in some way it had the

approval of the moving picture actresses, and under that theory, I think that the question is proper.

Trial Examiner Russell: I could see where that might be a circumstance.

Mr. Starin: I think that the question implies as to whether or not it had been endorsed by the movie colony, or by some particular movie star in view of the implication contained in the question, I think that it is objectionable because there isn't any allegation made that we have ever had any endorsement.

Trial Examiner Russell: Well, the representation is claimed, as I understand from his reading there, that it is a favorite of the movie stars.

Mr. Kash: "Favorite of the stars."

The Witness: The question you asked me is whether or not the stars have endorsed the product, as I understand your question.

(Testimony of Phil Howe.)

Mr. Kash: Yes.

Mr. Starin: That is the implication of the question on which I base my objection.

Trial Examiner Russell: I think that your objection should be sustained, and I sustain it.
Off the record.

(Discussion off the record.)

Trial Examiner Russell: On the record.

By Mr. Kash:

Q. Is any of your products designated "Howe's Hollywood Cleansing Cream, favorite of the

Stars" a favorite of any movie actress located in Hollywood, California, that you are aware of?

A. Well, I am not personally friendly with any of the stars. I don't know them personally, and I can't say. But I do add this, that we sell a lot of merchandise in Hollywood and vicinity. I know many, many instances, through conversations with the people in stores where these products are sold, that they are purchased and used by members of the film colony. A good many of the stars do not live in Hollywood, they live in Beverly Hills, and at the beaches, communities adjacent to Hollywood.

Q. How much of your product "Face Powder" is sold in Hollywood, California?

Mr. Starin: Did you say how much is sold?

Q. (Mr. Kash, continuing): How much as compared with your total sales, is sold in Hollywood or in the vicinity of Hollywood? Now, that is a product as I understand it that is actually made in Hollywood.

A. Your question is not clear. Do you mean what portion of our total sales?

Q. Of face powder.

A. Sold in Hollywood as represented by sales,

Mr. Kash: Read the question.

(Last question read by reporter.)

Q. (Mr. Kash, continuing): What was the proportion of your sales of face powder in Hollywood compared with your total sales elsewhere?

A. I can't answer that question unless I do some research, —— I can't answer that question.

Q. Could you answer as to your other products which are not made in Hollywood, and upon which appears "Favorite of the Stars," such as cleansing cream?

A. I could perhaps answer both questions if I understood them better.

Your first question was "How much face powder do we sell with reference to our total sales?"

Q. Of face powder.

A. As compared to our total sales of face powder.

Q. Yes.

A. Well, it could not be very large. Hollywood is only one city—one community—we sell in a large number of communities. It could only be a portion of what our total sales would be."

(Testimony of Phil Howe. R. 214-215)

"Then you asked for the percentage of sales in the area in and adjacent to Hollywood. I have a schedule here which I think would come under that classification, and the answer is 11.69 per cent to our total volume during the average month. We took May, 1942 as an average month.

Q. (Mr. Kash, continuing): That applied to what products?

A. All products, our sales in that area are 11.69 per cent of the total volume.

Q. (Trial Examiner Russell): Not limited to those that have the word "Hollywood" on them?

A. No, the total sales."

(Testimony of Caroline Ybarra. R. 368-373)

"Q. Mrs. Ybarra, you are a housewife?

A. Yes.

Q. You are not now employed in any other occupation?

A. No, sir.

Q. What was your former employment?

A. My last employment was with the Howe Company, as a sales girl.

Q. You have sold Hollywood cosmetics over the counter, have you?

A. Yes, sir.

Q. Where?

A. Hollywood, also Glendale.

Q. Mrs. Ybarra, prior to your employment in the cosmetics business, what was your occupation?

A. I was a professional dancer.

Q. Where were you employed in that profession?

A. I was employed in different night clubs, also in the studios around Hollywood.

Q. Are you familiar with the type of cosmetics that studios around Hollywood use?

A. I know as to the kind of make-up. You mean brands?

Q. Well, I will come to that. You are generally familiar with the types.

A. Yes, sir.

Q. Have you had an opportunity to observe whether or not people employed in the motion picture industry use Howe's Hollywood cosmetics?

A. When I was employed in the studios I didn't notice them. But when I was selling cosmetics I recognized so many of the faces that worked in the studios, the studio sets that I sold it to them personally. By that I don't mean I knew the people intimately, but I could recognize them as being people in the studios, because I was out there so often also.

Q. Were they actors and actresses that used these preparations?

A. Some of them were character actors and actresses. They weren't named actresses, so the minute you would see that name appear everybody in the world would know of him, who you were speaking of, but they were definitely studio people.

Q. Do you know some of the girls that work at Earl Carroll's?

A. Yes, sir.

Q. Do you know whether or not any of them use Howe's Hollywood cosmetics?

A. They definitely do.

Q. What is Earl Carroll's?

A. Earl Carroll's is a night club, a theater in Hollywood. They have a large girls' review.

Q. Is it a theater which is widely known?

A. Very widely known.

Q. That is the same Earl Carroll that was prominent on Broadway, in Broadway productions for many years?

A. The same.

Mr. Starin: You may cross examine.

Cross Examination.

By Mr. Kash:

Q. You say these girls were in Earl Carroll's Vanities?

A. Yes.

Q. In stage shows?

A. Yes, sir.

Q. These were not connected with the moving picture industry?

A. Some of them.

Q. In what capacity?

A. Well, they go in, in most cases, as dancers, and show girls is commonly the term for them. They are featured for their beauty.

Q. Are they classified as stars in the movie industry?

A. Yes, they are. I think, if I may add an opinion: I think the word "stars" covers a great field. I think that the fact that anyone excels in ány particular thing can be considered a star.

Q. Do you know who furnishes the makeup and prepares these actresses for their parts in Hollywood? Who is the leading makeup concern?

A. Yes, sir, I know two.

Q. Name them, please.

A. Max Factor and Westmore, and the reason for that is because they are professional makeup men, rather than for the merchandise.

Q. Max Factor uses his own products made in Hollywood, California?

A. I don't know where it is made, but it is labeled under his name.

Q. And he is located in Hollywood?

A. Yes, sir.

Q. What experience have you had with the Howe Company?

A. I was sales girl for a year and a half and district manager for a year.

Q. Where did you work, please?

A. On the West Coast, but principally Hollywood, Los Angeles and vicinities.

Q. And your duty was confined to the State of California; is that correct?

A. Yes.

Q. You have not operated in other states?

A. No, sir. I wish to clarify that. There was Arizona.

Q. These girls that worked in sets, and whom you saw used Howe's Hollywood cosmetics, what were their duties?

A. I don't believe I quite understand your question.

Q. I understand you to say some of the girls that worked in the sets—

A. Yes.

Q. —used Howe's cosmetics.

A. Yes.

Q. Just what were their duties? Were they chorus girls or girls who played minor parts?

A. Yes.

Q. They were not considered tops in their profession?

A. No, not as Carole Lombard or Joan Crawford.

Q. Do you know anybody in that class? Of Carole Lombard and Joan Crawford?

A. None that I sold to personally.

Q. Or Deanna Durbin—

A. No, I never sold to any of them personally.

Q. —that used Howe's preparations?

A. I don't know that they do and I don't know that they do not. I just didn't sell to them directly.

Q. In your profession as a professional dancer you did not come in contact with the so-called stars of the movie industry, did you?

A. In what way do you mean: come in contact with them?

Q. When they were making their pictures?

A. You mean was I around them?

Q. Yes.

A. Yes, indeed.

Q. Your duties as a dancer took you into the studios when they were making their pictures?

A. Yes, I was on many of the sets.

Q. Can you name any of the so-called leaders in the movie industry who use Howe's preparations?

A. No, I would rather not say that I did.

Mr. Kash: That is all.

Redirect Examination.

By Mr. Starin:

Q. You do know it was being used among other people who were actors and actresses in the industry?

A. Using it a great deal, among the theatrical people. Of that I know definitely, but to give you names of great stars, and say that I sold it to them personally, that I cannot do, but many of them do use it."

The foregoing is all the evidence in the record on the subject of whether the petitioners' products are or are not used or favored by people engaged in the motion picture industry.

Therefore, if the use of the word "Hollywood" in connection with cosmetics creates the impression that

motion picture people engaged in the motion picture industry located in Hollywood, California, use or favor such cosmetics, the Commission has wholly and completely failed to prove that this impression is untrue.

Under no possible construction of the above quoted testimony can it be concluded that motion picture people do not use petitioners' products.

It is basic and fundamental in a proceeding such as this that petitioners are not required to prove that their labels are not deceptive. The Commission must produce some evidence that they are deceptive. While it is an established rule that the Federal Trade Commission need not prove the allegations of its complaint by a preponderance of the evidence, it is also equally well established that there must be some substantial evidence to justify the finding of the Commission.

Kidder Oil Co. v. Federal Trade Commission, 117 Fed. (2d) 892;

Ostermoor & Co. v. Federal Trade Commission (2nd Circuit) 16 Fed. (2d) 962;

Arnold Stone Co., Inc. v. Federal Trade Commission, 49 Fed. (2d) 1017.

The Federal Trade Commission Act (U. S. Code Annotated, Title 15, §45(c) provides that "The findings of the commission as to the facts, if supported by evidence, shall be conclusive."

The National Labor Relations Act has a provision relative to the conclusiveness of the findings of the National Labor Relations Board, which is identical with the provision of the Federal Trade Commission Act above cited. (29 U. S. C. A. § 160[e]). It has been consistently held, under the provisions of the last statute, that the finding of the administrative body must be supported by evidence which is substantial.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 107; 59 S. Ct. 206;

National Labor Relations Board v. Columbian Enameling and Stamping Co., 306 U. S. 292; 59 S. Ct. 501;

National Labor Relations Board v. Thompson Products, Inc., (C. C. A. 6th) 97 Fed. (2d) 213;

Ballstron-Stillwater Knitting Co., Inc. v. National Labor Relations Board (C. C. A. 2nd), 98 Fed. (2d) 758;

Appalachian Electric Power Co. v. National Labor Relations Board (C. C. A. 4th) 93 Fed. (2d) 985.

The petitioners emphatically submit that upon the basic premise, which forms the foundation of this proceeding, namely, that the petitioners' advertising creates an untrue impression, the Commission has not only failed to produce substantial evidence to sustain its findings, but has completely failed to produce any evidence to sustain its findings.

In conclusion, petitioners submit that they have used the word "Hollywood" in connection with the sale of their products for more than ten years. (R. 189, 191, 198). In that period a substantial good-will has been created so that the right to use said trade name is a valuable property right. The Commission has failed to produce any evidence not only that anyone has ever been damaged by the use of the word "Hollywood," but has also failed to produce any evidence that the use of the said term creates any impression in the minds of the purchasing public which is a false impression. A valuable property right should not be arbitrarily destroyed where no substantial justification exists for its destruction.

It is, therefore, submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the United States Circuit Court of Appeals for the Ninth Circuit.

ALBERT E. STEPHAN,
807 Central Bldg.,
Seattle 4, Wash.

EDWARD STARIN,
(of Counsel)
2000 Northern Life Tower,
Seattle 1, Wash.
(Counsel for Petitioners)

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